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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Application Number: 09/809,273
Filing Date: March 16, 2001
Appellant(s): NISHII ET AL.

Keiko K. Takagi
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 17, 2009 appealing from the Office action mailed October 8, 2008.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

No amendment after final has been filed.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

US 4,667,814	WAKAMATSU ET AL.	5-1987
US 5,734,225	BIEBUYCK ET AL.	3-1998

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 4 and 13 are rejected under 35 U.S.C. 102(b) as being anticipated by Wakamatsu et al. (US 4,667,814). Wakamatsu et al. discloses an oxygen absorbent packet comprising a plastic sheet (2) ("non-porous sheet"), adhesive (8) in order to seal parts (2) and (6), an air-permeable non-woven sheet (6) (see col. 2, lines 43-45; the "reinforcing layer" of "porous sheet"), an air-impermeable layer that may have pores (10)(see col. 3, lines 39-44; the "porous layer" of the "porous sheet") and an aluminum foil covering (14) (alternatively also a "non-porous sheet"). Oxygen absorbent (4) is held in the container (per instant claim 13). See Figures 1 and 2.

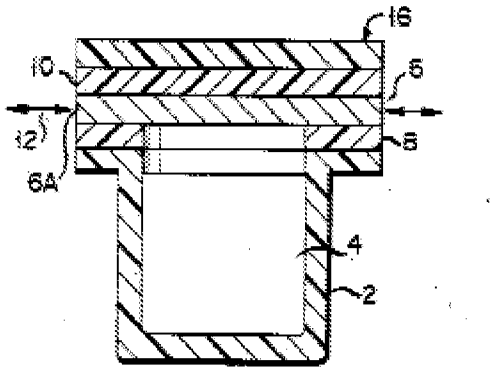


FIG. 1

Sheet (2) is considered to be a "flat" sheet that is shaped. This is the same type of sheet formation depicted in the present application's Figures 1 and 6. Accordingly, the reference is considered to meet the claim 4 requirement for "made of" flat sheets.

Claim 15 is rejected under 35 U.S.C. 103(a) as being unpatentable over Wakamatsu et al. (US 4,667,814). Wakamatsu et al. is relied upon as set forth above for the rejection of claim 4. Wakamatsu et al. fails to teach expressly the combined average pore size of the air-permeable non-woven sheet (6) (see col. 2, lines 43-45; the "reinforcing layer" of "porous sheet") and the

air-impermeable layer that may have pores (10) (see col. 3, lines 39-44; the "porous layer" of the "porous sheet") to form the "porous sheet". Wakamatsu et al. does teach if a microporous film is used, the pore size should range from 0.01 to 50 micrometers (see col. 2, lines 67-68) and that small pores are desirable (see col. 3, lines 39-43). It would have been obvious to one of ordinary skill in the art to have formed the sheet (6) and sheet (10) having pore sizes within the range of claim 15, because one would expect such a pore size to allow the desired amount of water and/or gases to pass through. Optimization of the pore size would result in allowing the desired amount of water and/or gases to pass through. Furthermore, the experimental modification of this prior art in order to ascertain optimum operating conditions fails to render applicants' claims patentable in the absence of unexpected results. *In re Aller*, 105 USPQ 233. A prima facie case of obviousness may be rebutted where the results of the optimizing variable, which is known to be result-effective, are unexpectedly good. *In re Boesch and Slaney,* 205 USPQ 215.

Claims 10, 12, and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wakamatsu et al. (US 4,667,814) in view of Biebuyck et al. (US 5,734,225). Wakamatsu et al. discloses an oxygen absorbent packet suitable for use in a sealed container for the purpose of absorbing oxygen (see col. 1, lines 5-8) wherein the packet comprises a plastic sheet (2) ("non-porous sheet"), adhesive (8) to seal (2) and (6), an air-permeable non-woven sheet (6) (see col. 2, lines 43-45; the "reinforcing layer" of "porous sheet"), an air-impermeable layer that may have pores (10)(see col. 3, lines 39-44; the "porous layer" of the "porous sheet") and an aluminum foil covering (14) (alternatively also a "non-porous sheet"). Oxygen absorbent (4) is held within the packet. See Figures 1 and 2.

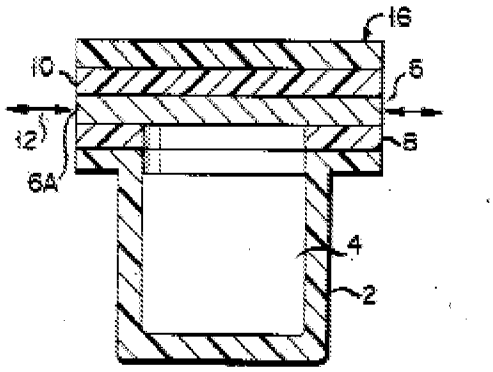


FIG. 1

Sheet (2) is considered to be a "flat" sheet that is shaped. This is the same type of sheet formation depicted in the present application's Figures 1 and 6. Accordingly, the reference is considered to meet the claim 10 requirement for "made of" flat sheets.

Wakamatsu et al. describe the packaging as being useful for sealing items in packaging in order to protect them from oxygen degradation, but are silent with respect to expressly teaching the packaging used in combination with an organic electroluminescent electronic device and used to protect the organic electroluminescent device from oxygen degradation. Biebuyck et al. discuss the importance of protecting an organic electroluminescent device from oxidation by encapsulating the device (see col. 1, lines 7-37 and col. 2, lines 43-44) and further describe it is desirable to have a protective film directly adjacent the EL device (see col. 2, lines 53-61). It would have been obvious to one of ordinary skill in the art at the time of the invention to have used the oxygen scavenger packet taught by Wakamatsu et al. in combination with an encapsulating container for protecting an organic electroluminescent device, because Wakamatsu et al. teach the packet contains an antioxidant for protection against oxidation for use within a container and Biebuyck et al. teach organic electroluminescent devices need encapsulating packaging in order to protect the devices from oxidation and subsequent limited lifetime of the

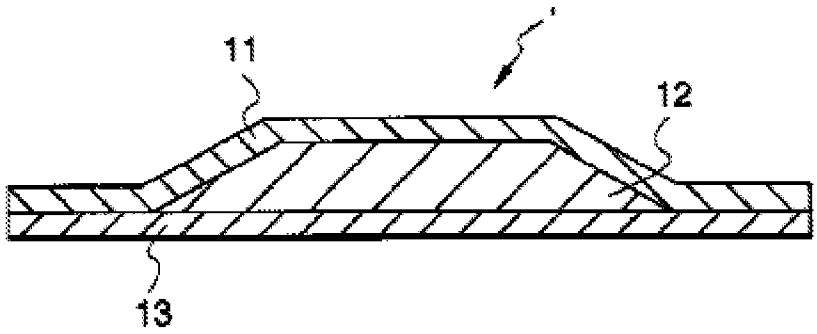
device due to oxidation. One would expect to achieve the predictable result of an oxygen absorbing environment for the beneficial protection of an electroluminescent device.

With regard to claim 17, Wakamatsu et al. is silent with respect to expressly teaching the combined average pore size of the air-permeable non-woven sheet (6) (see col. 2, lines 43-45; the "reinforcing layer" of "porous sheet") and the air-impermeable layer that may have pores (10) (see col. 3, lines 39-44; the "porous layer" of the "porous sheet") to form the "porous sheet". Wakamatsu et al. does teach if a microporous film is used the pore size should range from 0.01 to 50 micrometers (see col. 2, lines 67-68) and that small pores are desirable (see col. 3, lines 39-43). It would have been obvious to one of ordinary skill in the art to have formed the sheet (6) and sheet (10) having pore sizes within the range of claim 17, because one would expect such a pore size to allow the desired amount of water and/or gases to pass through. Optimization of the pore size would result in allowing the desired amount of water and/or gases to pass through. Furthermore, the experimental modification of this prior art in order to ascertain optimum operating conditions fails to render applicants' claims patentable in the absence of unexpected results. *In re Aller*, 105 USPQ 233. A prima facie case of obviousness may be rebutted where the results of the optimizing variable, which is known to be result-effective, are unexpectedly good. *In re Boesch and Slaney,* 205 USPQ 215.

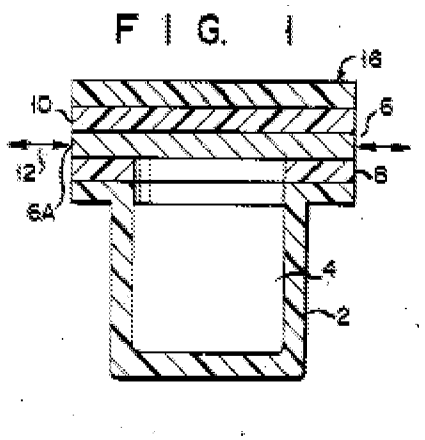
(10) Response to Argument

Appellant argues with regard to Wakamatsu that the reference does not disclose every element of claim 4 and fails to disclose a container made of two flat sheets joined together only at their peripheries, as recited in claim 4. In response, the examiner notes that the claim states

"said container is *made of* two flat sheets". Claim 4 does not expressly require that the sheets are actually flat in the final product, but rather requires that the sheets are *made of* two flat sheets. The term “flat sheets” was first claimed in the amendment received March 17, 2008. Applicant stated in the remarks filed accompanying the amendment received March 17, 2008, "Claims 4 and 10 have been amended to recite that the sheets forming the claimed container are flat based on, for example, the Figures and associated disclosure in the specification." The examiner notes that the exact word "flat" is not included in the text of the original disclosure and that applicant relies upon the figures of the present application for support for "made of two flat sheets". Appellant further discussed the method of making a member from flat sheets and the figures in the remarks received July 29, 2008 on page 4. Appellant's figure 1 is the following, which clearly shows a “bended" flat sheet (11) in the final product:

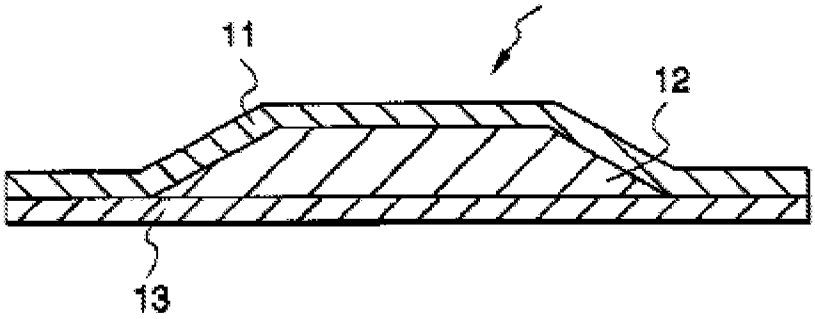


Similarly, prior art reference, Wakamatsu et al., show a curved flat sheet (2) that is joined with a flat sheet:



Appellant further argues on page 9 of the brief that "Wakamatsu discloses reference 2 as being a blister ***molded*** cup-like plastic container. *See* col. 2, line 30 (emphasis added). The, molded container 2 of Wakamatsu is clearly not a flat sheet and thus, the container 2 of Wakamatsu is different from the non-porous flat sheet of claim 4." Appellant's arguments are not found persuasive by the examiner because, no particular method of making the sheets has been claimed. Accordingly, appellant's argument that the Wakamatsu product being formed by a molding process is not persuasive. Appellant argues part 2 of Wakamatsu is clearly not a flat sheet, but the claims do not require a flat sheet, but rather require a member "made of" two flat sheets.

The examiner has previously described appellants figures as showing a structure that is formed into a concave shape in the final product (see present application figures 1 and 2). Appellant argues present application Fig. 2 only shows the presence of the removing agent between the two flat sheets. Appellant also argues present Fig. 1 does not show a molded or shaped container:



(Figure 1 of present application)

In response, the examiner submits portion (11) of appellant's Figure 1 drawing as shown above is clearly formed into a shaped structure. Furthermore, the claims do not expressly exclude a molded sheet or a molding process. Again, the examiner submits the claims only require a final product "made of" two flat sheets.

Appellant argues the present specification on page 6 discloses a particular method for forming the claimed sheets. Again, the examiner submits that the claims are not drawn to a process. Determination of patentability of a product is based upon the product itself and not the method of production.

With regard to the rejection over Wakamatsu in view of Biebuyck et al., appellant again argues Wakamatsu does not teach a container made of two flat sheets joined together only at their peripheries. As discussed above, the examiner submits Wakamatsu discloses all of the sheets and components required by the claims and portion (2) of Wakamatsu is considered to correspond to a sheet that is "made of" a flat sheet. Appellant argues Biebuyck does not make up for the deficiencies of Wakamatsu in teaching a container made of two flat sheets joined at their peripheries. The examiner submits Wakamatsu discloses a packet comprising all of the required components for use within a container as part of an oxygen absorbing environment.

Biebuyck teaches an encapsulated, protected electroluminescent device as part of an oxygen-deficient encapsulated environment. The examiner further notes that independent claim 10 does not require a particular arrangement for how the container and electroluminescent device are arranged or combined.

In conclusion, Wakamatsu et al. is considered to teach all elements of the claimed "container" member. Appellant's primary arguments are drawn to the limitation requiring that a "container is made of two flat sheets". The examiner maintains Wakamatsu discloses an absorbing article comprising components corresponding to the final product member as claimed by appellant.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Dawn Garrett/
Primary Examiner, Art Unit 1794

Conferees:

/Jennifer Michener/

QAS, TC1700

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794